

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HANSGEORG HOFE,

Defendant-Appellant.

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UNPUBLISHED

May 19, 2005

No. 250653

Oakland Circuit Court

LC No. 02-186010-FC

Before: Saad, P.J., and Zahra and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of first-degree murder of a peace officer, 750.316(1)(c), second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.277b. Defendant was sentenced to life in prison for his first-degree murder conviction, to be served consecutively to two years' imprisonment for his felony-firearm conviction. We affirm in part, vacate in part, and remand for modification of the judgment of sentence.

**I. Facts and Procedure**

Defendant was walking his dog in front of his apartment complex when he stopped to talk to one of the tenants. The tenant observed that defendant appeared to be "very" drunk.<sup>1</sup> When the landlord of the apartment complex appeared and told defendant to put his dog on a leash, the two got into an argument and defendant became very angry. Defendant told the tenant that if he called the police, defendant would come back and "blow them away" and "blow the cops away." After defendant left, the tenant called the police. Officer Jessica Wilson responded to the call and went to defendant's apartment, where defendant was outside with a shotgun. Officer Wilson and defendant then shot each other. Officer Wilson died from the shotgun blast that night in the hospital. Defendant later told police that he thought that Officer Wilson had shot first, but he was not sure. He stated, "I must have just pulled the trigger out of reflex[,] not on purpose."

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<sup>1</sup> When defendant was taken to the hospital later, it was determined that his blood alcohol content was .30.

## II. Analysis

### A. Involuntary Manslaughter Instruction

Defendant argues that the trial court erred in denying his requests to instruct the jury on the necessarily included lesser offense of involuntary manslaughter. “This Court generally reviews claims of instructional error de novo. . . . But a trial court’s determination whether a jury instruction is applicable to the facts of the case is reviewed for an abuse of discretion.” *People v Hawthorne*, 265 Mich App 47, 50; 692 NW2d 879 (2005). “ ‘A criminal defendant is entitled to have a properly instructed jury consider the evidence against him.’ ” *Id.* at 57, quoting *People v Riddle*, 467 Mich 116, 124; 649 NW2d 30 (2002).

“[B]oth forms of manslaughter are necessarily included lesser offenses of murder. Because voluntary and involuntary manslaughter are necessarily included lesser offenses, they are also ‘inferior’ offenses within the scope of MCL 768.32. Consequently, when a defendant is charged with murder, an instruction for voluntary and involuntary manslaughter must be given if supported by a rational view of the evidence.” [*Hawthorne*, *supra* at 58, quoting *People v Mendoza*, 468 Mich 527, 541; 664 NW2d 685 (2003), citing *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002).]

“[D]etermining whether a rational view of the evidence may support a manslaughter conviction requires considering whether a rational jury could conclude that the defendant did not act with malice . . . .” *People v Holtschlag*, 471 Mich 1, 16 n 8; 684 NW2d 730 (2004).

“[T]he sole element distinguishing manslaughter and murder is malice.” *Mendoza*, *supra* at 536. If a homicide was committed with gross negligence or an intent to injure, and not malice, it is not murder, but only manslaughter. *Holtschlag*, *supra* at 21. “Involuntary manslaughter is the unintentional killing of another, without malice, during the commission of an unlawful act not amounting to a felony and not naturally tending to cause great bodily harm; or during the commission of some lawful act, negligently performed; or in the negligent omission to perform a legal duty.” *Mendoza*, *supra* at 536. In addition to common-law manslaughter, the Legislature has determined that manslaughter shall exist when a homicide is committed without malice by means of an intentionally aimed firearm. MCL 750.329; *Mendoza*, *supra* at 536 n 7.<sup>2</sup> “Malice is defined as the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm.” *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998).

Defendant argues that because the evidence supported an involuntary manslaughter instruction, the trial court erred in failing to give such an instruction. Defendant’s request for an involuntary manslaughter instruction was based on his theory that he fired the shotgun

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<sup>2</sup> “Any person who shall wound, maim or injure any other person by the discharge of any firearm, pointed or aimed, intentionally but without malice, at any such person, shall, if death ensue from such wounding, maiming or injury, be deemed guilty of the crime of manslaughter.” MCL 750.329.

accidentally after being shot by Officer Wilson. Even if we assume that the trial court erred in failing to charge the jury with an involuntary manslaughter instruction, defendant cannot establish that such error requires reversal of his conviction.

“[H]armless error analysis is applicable to instructional errors involving necessarily included lesser offenses.” *Cornell, supra* at 361.<sup>3</sup> This case involves a nonconstitutional error that has been preserved by defendant’s request for the lesser included offense instruction. See *id.* at 363.

A preserved, nonconstitutional error is not a ground for reversal, “unless ‘after an examination of the entire cause, it shall affirmatively appear’ that it is more probable than not that the error was outcome determinative.” Stated another way, the analysis focuses on whether the error undermined reliability in the verdict. Therefore, to prevail, defendant must demonstrate that it is more probable than not that the failure to give the requested lesser included . . . instruction undermined reliability in the verdict. [*Id.* at 363-364 (citations omitted).]

“[I]t is only when there is substantial evidence to support the requested instruction that an appellate court should reverse the conviction.” *Id.* at 365.

[I]t is important to note that this “substantial evidence” standard for determining whether reversal is required on the basis of an instructional error differs from the standard for determining whether the error occurred. . . . [A]n evidentiary dispute supported by a rational view of the evidence regarding the element that differentiates the lesser from the greater offense will generally require an instruction on the lesser offense. However, more than an evidentiary dispute regarding the element that differentiates the lesser from the greater offense is required to *reverse* a conviction; pursuant to MCL 769.26, the “entire cause” must be surveyed. [*Cornell, supra* at 365-366.]

Here, the theory of the defense was that the shooting was an accident. As discussed, there is evidence supporting defendant’s theory that Officer Wilson fired her gun before defendant fired his. However, even if the jury accepted that defendant shot Officer Wilson after he was shot, there is little evidence in the record to support defendant’s theory that his finger jerked reflexively after he was shot, and that this reflex caused him to accidentally pull the trigger of the shotgun. Thus, we cannot conclude that there was substantial evidence to support the involuntary manslaughter instruction. Further, as discussed in part II(B) of this opinion, the trial court properly instructed the jury on the defense of accident, instructing the jury that it should acquit defendant of murder if it found that the shooting was accidental. By convicting defendant of murder, the jury necessarily found that defendant had acted with malice, obviating

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<sup>3</sup> Defendant’s argument that a trial court’s failure to instruct on a necessarily included lesser offense is structural error requiring reversal lacks merit. In *Cornell, supra* at 363 n 17, our Supreme Court expressly rejected such an argument.

the possibility that the shooting was an accident. The jury's finding that defendant acted with malice and that the shooting was not an accident indicate a lack of likelihood that it would have adopted the lesser requested charge of involuntary manslaughter. *People v Beach*, 429 Mich 450, 491; 418 NW2d 861 (1988).

## B. Accident Instruction

Next, defendant argues that the trial court erred by modifying the standard jury instruction for accident as a defense to murder. Defendant contends that the language the trial court added to the standard jury instruction and the court's definition of the term "accident" both were incorrect statements of law, confused the jury, and infringed on his right to present a defense. "This Court generally reviews claims of instructional error de novo." *Hawthorne, supra* at 50. "This Court also reviews de novo the constitutional question whether a defendant was denied her constitutional right to present a defense." *Id.*, quoting *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002). "Jury instructions are reviewed in their entirety to determine if error requiring reversal occurred. It is the function of the trial court to clearly present the case to the jury and instruct on the applicable law." *People v McKinney*, 258 Mich App 157, 162; 670 NW2d 254 (2003) (citations omitted). "Even if somewhat imperfect, jury instructions are not erroneous if they fairly present the issues for trial and sufficiently protect the defendant's rights." *People v McLaughlin*, 258 Mich App 635, 668; 672 NW2d 860 (2003). "The standard jury instructions do not have the official sanction of the Michigan Supreme Court and, consequently, adherence to their choice of language is not required." *People v Bono (On Remand)*, 249 Mich App 115, 123 n 6; 641 NW2d 278 (2002), citing *People v Petrella*, 424 Mich 221, 227; 380 NW2d 11 (1985), and *People v Sullivan*, 231 Mich App 510, 520 n 1; 586 NW2d 578 (1998), *aff'd* 461 Mich 992 (2000).

Here, the trial court first gave the standard instruction for accident by an involuntary act as a defense to murder, CJI2d 7.1.<sup>4</sup> After reciting the standard accident instruction verbatim, the trial court added: "If you find the defendant knowingly created a very high risk of death or great bodily harm, knowing that such death or such harm would be the likely result of his actions, the defens[e of] accident does not apply." This instruction is a correct statement of law, clarifying that if the jury found that defendant possessed a malicious intent, *Goeke, supra* at 464, then the requisite intent for murder was proven, and defendant could not rely on his claim that the shooting was an accident. This portion of the court's accident instruction is similar to defendant's requested standard jury instruction for accident as a defense to murder (not knowing consequences of act), CJI2d 7.2, which provides, in pertinent part, "defendant means that [he /

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<sup>4</sup> CJI2d 7.1 provides:

(1) The defendant says that [he / she] is not guilty of \_\_\_\_\_ because \_\_\_\_\_'s death was accidental. That is, the defendant says that \_\_\_\_\_ died because [*describe outside force; e.g., "the gun went off as it hit the wall"*].

(2) If the defendant did not mean to [pull the trigger / (*state other action*)] then [he / she] is not guilty of murder. The prosecutor must prove beyond a reasonable doubt that the defendant meant to \_\_\_\_\_.

she] did not mean to kill or did not realize that what [he / she] did would probably cause a death or cause great bodily harm.”

Defendant also contests the trial court’s following instruction defining “accident”:

Accident has been judicially defined as a fortuitous circumstance, even[t] or happening, an event happening without any human agency or if happening wholly or partly through human agency [a]n event which under the circumstances is unusual and unexpected by the person to who[m] it happens.

An unusual, fortuitous, unexpected, unforeseen or unlooked [for] event, happening or occurrence. An unusual or expected result intending the operation or performance of an unusual or necessary act or event, chance or contingency, fortune, mishap, some sudden or unexpected event taking place without expectation. Upon the instant rather than something that continues, progresses or develops. Something happening by chance. Something unforeseen, unexpected, unusual, extraordinary or phenomenal taking place not according to the usual course of things or events, out of the range of ordinary calculations that exists or occurs abnormally or an uncommon occurrence.

The trial court’s definition of “accident” is virtually a direct quote from *People v Hess*, 214 Mich App 33, 37; 543 NW2d 332 (1995). In *Hess*, *supra* at 37, this Court gave the follow definition of “accident”:

[A] fortuitous circumstance, event or happening; an event happening without any human agency, or if happening wholly or partly through human agency, an event which under the circumstances is unusual and unexpected by the person to whom it happens; an unusual, fortuitous, unexpected, unforeseen or unlooked for event, happening or occurrence; an unusual or unexpected result attending the operation or performance of a usual or necessary act or event; chance or contingency; fortune; mishap; some sudden and unexpected event taking place without expectation, upon the instant, rather than something which continues, progresses or develops; something happening by chance; something unforeseen, unexpected, unusual, extraordinary or phenomenal, taking place not according to the usual course of things or events, out of the range of ordinary calculations; that which exists or occurs abnormally, or an uncommon occurrence. [*Id.*, quoting *Allstate Ins Co v Freeman*, 432 Mich 656, 669 n 8; 443 NW2d 734 (1989), quoting *American States Ins Co v Maryland Casualty Co*, 587 F Supp 1549, 1552 (ED Mich, 1984).]

There is no substantive difference between the trial court’s definition of “accident” and the definition articulated by this Court in *Hess*. Since defendant does not allege that *Hess* stands for an improper statement of law, and defendant does not point to any particular portion of the court’s statement that was incorrect or likely to confuse the jury, we conclude that the trial court’s accident instruction was not erroneous.

Finally, we conclude that the trial court did not err by failing to give the standard jury instruction for accident as a defense to a specific intent crime, CJI2d 7.3a.<sup>5</sup> By giving the standard instruction for accident as a defense to murder, the court properly explained that if the shooting was an accident, defendant was not guilty of murder. Giving CJI2d 7.3a would have been redundant. Because the trial court had given an instruction that accident was a defense to murder, it was not required to give CJI2d 7.3a in order to fairly present the issues for trial and sufficiently protect the defendant's rights. *McLaughlin*, *supra* at 668.

### C. Expert Witnesses

Next, defendant contests the trial court's admission of the testimony of two expert witnesses. Expert testimony is admissible if (1) the expert is qualified, (2) the testimony provides the fact-finder with a better understanding of the evidence or assists in determining a fact in issue, and (3) the evidence comes from a recognized discipline. *People v Matuszak*, 263 Mich App 42, 51; 687 NW2d 342 (2004). An expert may render an opinion based on observation, a hypothetical question, hearsay information, the testimony of other witnesses, or the findings and opinions of other experts. *People v Dobben*, 440 Mich 679, 695-696; 488 NW2d 726 (1992). We review for an abuse of discretion a trial court's decision whether to admit expert witness testimony. *People v Phillips*, 246 Mich App 201, 203; 632 NW2d 154 (2001), *aff'd* 468 Mich 583; 663 NW2d 463 (2003).

#### 1. Dr. Ljubisa Jovan Dragovic

Defendant argues that the trial court reversibly erred when it allowed Dr. Ljubisa Jovan Dragovic, a prosecution rebuttal witness, to comment on the factual findings, opinions, and credibility of defendant's expert witness, Dr. Werner Spitz.<sup>6</sup> “ ‘Rebuttal testimony may be used to contradict, repel, explain, or disprove evidence presented by the other party in an attempt to weaken and impeach it.’ ” *People v Rice (On Remand)*, 235 Mich App 429, 442; 597 NW2d 843 (1999), quoting *People v Leo*, 188 Mich App 417, 422; 470 NW2d 423 (1991). The question of whether rebuttal evidence was properly admitted depends on what proofs the defendant introduced and whether the rebuttal evidence is properly responsive to evidence introduced or a theory developed by the defendant. *People v Figgures*, 451 Mich 390, 399; 547 NW2d 673 (1996). “As long as evidence is responsive to material presented by the defense, it is properly classified as rebuttal, even if it overlaps evidence admitted in the prosecutor's case in chief.” *Id.*

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<sup>5</sup> CJI2d 7.3a provides:

The defendant says that [he / she] is not guilty of [*state crime*] because [he / she] did not intend to [*state specific intent required*]. The defendant says that [his / her] conduct was accidental. If the defendant did not intend to [*state specific intent required*], [he / she] is not guilty. The prosecutor must prove beyond a reasonable doubt that the defendant intended to [*state specific intent required*].

<sup>6</sup> Dr. Spitz is an expert in anatomical and forensic pathology.

Defendant argues that, in three separate instances, Dr. Dragovic's testimony was improperly admitted. Defendant first argues that the trial court abused its discretion in overruling his objection to the following testimony by Dr. Dragovic:

Q. You heard [Dr. Spitz's] testimony with regard to the injury of the spinal column and things of that nature. Is that correct?

A. Yes, sir.

Q. Do you take dispute with any of his findings?

A. Well, I think that there was a misunderstanding there which . . . turned out to be quite dramatic. The . . . talk about the damage of the spinal cord was based on the report that Doctor [Bernardino] Pacris . . . found the majority of the pellets at the C7 level. And there were some at a T1 level and around, all over around and maybe some at the C6 level.

Now, he was talking about the levels of [the] spinal column. We're talking about the bony structures. Not about the segments of the spinal cord.

The prosecution offered Dr. Dragovic's testimony to clarify and explain the difference in Dr. Pacris'<sup>7</sup> and Dr. Spitz's testimony. Dr. Dragovic explained that there was an anatomical discrepancy between the level of bony structure and the level of spinal cord segments, meaning that a particular segment of the spinal cord does not necessarily correspond to the same segment of the spine or bony structure. Because Dr. Dragovic's testimony provided the jury with a better understanding of the evidence, it was properly admissible as rebuttal.

Defendant next argues that the trial court abused its discretion in allowing the following testimony by Dr. Dragovic:

Q. I believe Doctor Spitz testified that he believed that a whole segment, whole section of the spinal cord was gone?

A. That's not correct. That's not true. There are photos, clear cut photos of exposed spinal cord there. And there is piercing of the left side of the spinal cord. There is no damage to the right side of the spinal cord. And [the] spinal cord is about three-quarters of an inch wide and . . . about three-eighths of an inch thick.

Because defendant failed to preserve this issue by objecting to this testimony at trial, MRE 103(a)(1), our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999).

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<sup>7</sup> Dr. Pacris is an expert in forensic pathology.

During defendant's presentation of proofs, Dr. Spitz testified that, based on his observation of the photographs of Officer Wilson's injury, Officer Wilson's spinal cord had been completely severed and was "gone" over at least a one inch section. The prosecution offered Dr. Dragovic's testimony to rebut Dr. Spitz's claim that Officer Wilson's spinal cord was "gone" at that level. Dr. Dragovic's opinion was based on his own observation of the same photographs that Dr. Spitz used to offer his opinion. The trial court did not plainly err in allowing this testimony, as it was used for the proper purpose of contradicting Dr. Spitz's testimony.

Defendant also argues that the trial court impermissibly allowed Dr. Dragovic to comment on Dr. Spitz's credibility by making the following statement during cross-examination:

- A. I like Doctor Spitz, but I prefer the truth. I'm telling you what I see in the tissue here. I cannot conform to [the] explanation that Doctor Spitz offered. I like him dearly, but I cannot.

Our review of this unpreserved error is limited to plain error affecting defendant's substantial rights. *Carines, supra* at 763, 774.

It is true that "expert testimony regarding the credibility of a witness is improper, because the jury is the sole arbiter of witness credibility." *Franzel v Kerr Mfg Co*, 234 Mich App 600, 622; 600 NW2d 66 (1999). However, Dr. Dragovic's testimony is less of an attack on Dr. Spitz's credibility than it is a mere disagreement with Dr. Spitz's expert opinion regarding this particular issue. Therefore, the trial court did not plainly err in allowing this testimony.

## 2. Deputy John Jacob

Next, defendant argues that the trial court abused its discretion by allowing Deputy John Jacob, a firearms investigation expert for the prosecution, to testify beyond his area of expertise by giving opinions that required medical and injury-related expertise. MRE 702 provides:

If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

"The subject matter of the expert's testimony should be directly related to and within the immediate scope of the witness' expertise." *Franzel, supra* at 621.

Deputy Jacob testified that firearms investigation "covers any aspect of ammunition and firearms, shooting reconstruction using firearms and components within a firearm, [including] components within ammunition." He testified that his knowledge included visible external injuries that relate to firearms, including stripping on the skin and patterns on clothing, but did not extend to internal injuries that penetrated into the skin or internal wound tracking. Deputy Jacob testified that he examined Officer Wilson's neck and forearm injuries, defendant's shotgun, Officer Wilson's weapon, the wadding recovered from Officer Wilson's body, the fired

shotgun shell, the lead shotgun pellets recovered from Officer Wilson's arm, and the damage to Officer Wilson's vest, badge, and shirt. Deputy Jacob also conducted tests on defendant's and Officer Wilson's firearms. Based on his examination of this evidence and his knowledge regarding how police officers shoot and are trained to shoot, Deputy Jacob testified that it was his opinion that Officer Wilson was confronted with a risk of danger, drew her weapon with both hands, assumed a crouching, firing position, and was in this position when defendant shot her. Deputy Jacob opined that defendant was five to ten feet away at the time of the shooting. In rendering his opinion, Deputy Jacob considered how the pellets hit Officer Wilson's arm and entered the skin, the shape of Officer Wilson's body, and the location and extent of the damage to the vest, shirt, and badge in relation to Officer Wilson's neck injury.

We conclude that the trial court did not abuse its discretion in holding that Deputy Jacob testified within the realm of his knowledge and expertise. Deputy Jacob expressed an opinion regarding how the pellets from defendant's shotgun caused certain injuries to Officer Wilson and damaged her shirt, bulletproof vest, and badge. He did not offer a medical opinion regarding the extent of Officer Wilson's injuries, but referred to her injuries only in rendering an opinion regarding the position she was in when she was shot, defendant's distance away from her, and the projectile of the shot. Deputy Jacob's testimony primarily dealt with shooting reconstruction, which was within the realm of his expertise as a firearms investigator.

#### D. Double Jeopardy

Next, although not raised by defendant, we conclude that defendant's dual murder convictions violate his protection against double jeopardy. The jury convicted defendant of both first-degree murder of a peace officer and second-degree murder for the killing of Officer Wilson. Dual convictions arising from the death of a single victim violate double jeopardy. *People v Bigelow*, 229 Mich App 218, 220; 581 NW2d 744 (1998). Therefore, we vacate defendant's conviction of second-degree murder. *People v Passeno*, 195 Mich App 91, 96; 489 NW2d 152 (1992), overruled in part on other grounds by *Bigelow*, *supra*. The judgment of sentence also erroneously indicates that defendant was convicted of first-degree felony murder, MCL 750.316(1)(b), when he was actually convicted of first-degree murder of a peace officer, MCL 750.316(1)(c). We remand for modification of the judgment of sentence to reflect that defendant was convicted of first-degree murder of a peace officer and felony-firearm.

#### E. Cumulative Error

Finally, defendant argues that reversal is required by the cumulative effect of the errors raised on appeal. "This Court review[s] a cumulative-error argument to determine if the combination of alleged errors denied the defendant a fair trial." *People v Hill*, 257 Mich App 126, 152; 667 NW2d 78 (2003). "The cumulative effect of several minor errors may warrant reversal even where the individual errors in the case would not warrant reversal." *Id.* However, the only errors in this case were the trial court's failure to give an involuntary manslaughter instruction and the double jeopardy violation. We have concluded that the instructional error was harmless and have vacated defendant's conviction that violated double jeopardy. Therefore, reversal is not warranted on the theory of cumulative error.

Affirmed in part, vacated in part, and remanded for modification of the judgment of sentence. We do not retain jurisdiction.

/s/ Henry William Saad

/s/ Brian K. Zahra

/s/ Bill Schuette